No. 22,630

IN THE

United States Court of Appeals

For the Ninth Circuit

JONES STEVEDORING COMPANY,
a corporation,
Appellant,

vs.

NIPPO KISEN COMPANY, LTD.,
a corporation,
Appellee.

NIPPO KISEN COMPANY, LTD.,
a corporation,
Appellant,

vs.

STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
Appellee.

On Appeal from the United States District Court for the Northern District of California

Honorable Lloyd H. Burke, District Court Judge

OPENING BRIEF FOR APPELLANT

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT

This is an appeal from findings of facts, conclusions of law, and judgment rendered in favor of appellee,

Nippo Kisen Co., Ltd., and against appellant, Jones Stevedoring Company.

The action was commenced by the filing of a complaint in admiralty (R. 1) alleging that the plaintiff, Joseph F. Mastro, a longshoreman, was injured aboard the SS HOKYO MARU, a vessel owned and operated by defendant and appellee, Nippo Kisen Co., Ltd. (served as Doe I), which vessel was then berthed in navigable waters of the United States at the port of Stockton, California. The complaint sought damages for personal injuries caused by the unseaworthiness of the vessel and the negligence of the defendant.

The action was based upon the General Maritime Law, and the District Court had jurisdiction by virtue of 28 U.S.C. section 1333 (admiralty jurisdiction).

After answering the complaint, Nippo Kisen Co., Ltd. filed an impleading petition (R. 15) against third-party defendant and appellant Jones Stevedoring Company, as well as against third-party defendant and appellee Stockton Bulk Terminal Company of California, Inc. for indemnity with regard to any payment to Mastro by way of judgment or settlement, and in addition, attorney's fee and costs of defense of his action.

Although originally filed as a civil action, the matter was transferred to the admiralty docket by stipulation. (R. 20.) Other parties and pleadings were dismissed prior to trial and are of no concern here.

The case was tried in two portions. In March of 1965, evidence was heard relating mainly to issues

of liability and damages between Mastro and Nippo Kisen Co., Ltd., although some evidence bearing upon indemnity was taken. The Honorable Lloyd H. Burke, sitting in admiralty, made certain findings of fact and conclusions of law to the effect that the sole cause of the accident was the negligence of Mastro, himself. He found no negligence on the part of the defendant, and no unseaworthiness of its vessel. (R. 108-114.)

The remainder of the case was then heard in May of 1967, and Judge Burke made the following finding of fact which is disputed on appeal:

> "1. Plaintiff, Joseph F. Mastro, was at all material times employed as a longshoreman by Jones Stevedoring Co., and not by Stockton Bulk Terminal Company of California, Inc." (R. 139.)

The court made the following conclusions of law, which are disputed on appeal:

> "1. Mastro's failure to exercise reasonable care and caution in the course and scope of his employment by Jones Stevedoring Co., constitutes a breach of Jones Stevedoring Co.'s warranty to perform their work in a safe, proper and workmanlike manner."

> "3. Third-Party Plaintiff (Nippo Kisen Co., Ltd.) is entitled to a decree in its favor against Third-Party Defendant, Jones Stevedoring Co., in the amount of $7,132.90, with court costs and interest from March 4, 1966." (R. 139.)

Simply stated, the question in the indemnity case as presented to the trial court, was which of the two third-party defendants, Jones Stevedoring Co. or

Stockton Bulk Terminal Company of California, Inc., should be required to indemnify the shipowner. The decision went against Jones, and this appeal resulted.

The final judgment, from which this appeal is taken, was entered on October 30, 1967. (R. 140-141.)

This court has jurisdiction by virtue of 28 U.S.C. section 1291 (appeal from a final decision of the District Court), invoked by timely Notice of Appeal filed November 21, 1967. (R. 142.)

STATEMENT OF THE CASE

1. The Accident

Mastro, a longshoreman, was aboard appellee Nippo Kisen's vessel, the HOKYO MARU, to assist in loading it with bulk iron ore. The loading of the cargo was done by means of specialized equipment at Stockton Bulk's ore loading dock at Stockton. The ore was brought to the dock in railroad cars, and stockpiled on the dock. It was then placed on a system of conveyors which took the ore from ground level up to a tower, where it was dropped through a loading spout suspended from the tower and directed into the hold of the ship. The loading spout had to be moved from place to place in the hatch to load it evenly by means of blocks, wire cable, and the ship's winches. While attempting to move one of the blocks so as to change the position of the loading spout, Mastro allowed his hand to come in contact with a moving cable, which pulled his hand into a block, injuring him. Respondent's Revised Proposed Findings of Fact and Con-

clusions of Law Between Libelant and Respondent. (R. 110-113.) These facts are not disputed, and Mastro is not a party to this appeal.

2. Indemnity

It was not disputed at the trial that the shipowner, Nippo Kisen Co., Ltd., was entitled to indemnity from either Jones Stevedoring Co., or Stockton Bulk Terminal Company of California, Inc., nor was the amount of attorney's fee and defense costs contested. The question, simply stated, as presented to the District Court, was which of the two third-party defendants should be required to indemnify the shipowner.

There was no direct contract of any sort between Jones and Nippo Kisen, or between Stockton Bulk and Nippo Kisen. The vessel owner orally contracted with Stockton Port District (a municipal corporation) for the loading of its ship. The port in turn orally contracted with Stockton Bulk, whereby Stockton Bulk undertook to do all the stevedoring work on the vessel. Pre-trial statement of Nippo Kisen. (R. 89-90.)

Stockton Bulk in turn had an oral arrangement with Jones whereby Jones would perform certain payroll and clerical work for Stockton Bulk in connection with Stockton Bulk's activities in loading the vessel. As contemplated by this arrangement, and as carried out in practice, Stockton Bulk had supervision and control of all of the operations involved in loading the ship. Jones performed merely the paper-

work involved in processing the payrolls for the longshoremen. (Tr. 215-216.)

Therefore, Jones was only a payroll agent; that was its contention at trial and remains its contention on appeal. Stockton Bulk is the proper party to indemnify the shipowner, since that company had supervision and control of all longshore employees aboard the vessel, including Mastro. Stockton owed a warranty of workmanlike service to the vessel, but Jones owed no such warranty. Futhermore, it is the contention here, as it was in the court below, that Stockton Bulk and not Jones, was Mastro's employer, in light of the arrangement between Jones and Stockton Bulk.

Evidence was presented on these issues, and Jones requested that detailed findings be made as to all of the underlying facts. (R. 132-137.) However, the judge refused to particularize, concluding simply that Mastro was Jones' employee. (R. 139.)

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that Jones Stevedoring Company owed a warranty of workmanlike service to Nippo Kisen Co., Ltd., under the law and the evidence of the case. (R. 139.)

2. The District Court erred in finding that Mastro was employed as a longshoreman by Jones Stevedoring Company and not by Stockton Bulk Terminal Company of California, Inc. (R. 139.) This finding is clearly erroneous, and is not supported by substantial

evidence. Also, this is a conclusion of law, rather than a finding of fact. The findings of fact as made were inadequate.

3. The District Court erred in holding that Mastro's own negligence constituted a breach of a warranty owed to Nippon Kisen Co., Ltd., by Jones Stevedoring Company to perform their work in a safe, proper and workmanlike manner. (R. 139.)

4. The court erred in awarding pre-judgment interest.

SUMMARY OF ARGUMENT

1. Jones Owed No Warranty

(a) The shipowner's right of indemnity arises from the contractual relationship between it and the company performing the ship-loading operation. The warranty arises for two reasons:

(1) The ship-loading contractor (normally called the stevedore) holds itself out as an expert in its field, and the shipowner relies on that holding out;

(2) The contractor is in a better position than the shipowner to prevent accidents occurring as the result of defects in its own equipment or human failures on the part of the men performing its work.

(b) The evidence clearly showed that Stockton Bulk was the contractor for the loading of the ship, that it had direction and control of the facilities, equipment, and method of loading the ship, and su-

pervision and control of the longshoremen. Jones, on the other hand, merely had a contract for the performance of certain payroll and other clerical services for Stockton Bulk in connection with its ship-loading operations; Jones had nothing to do with the work being done.

(c) Therefore, Stockton Bulk met both of the requirements for the imposition of the warranty of workmanlike service, and Jones Stevedoring Company met neither. Accordingly, it was error to hold that Jones owed Nippo Kisen a warranty to perform any stevedoring services in a workmanlike manner and to require Jones to indemnify Nippo Kisen. Stockton Bulk, rather than Jones, should be held liable in indemnity.

2. Mastro Was Not Jones' Employee

(a) The finding of fact which held that Mastro was an employee of Jones should have been labeled a conclusion of law, since the determination of employment requires the application of a legal standard to a number of underlying facts. The Court of Appeals is not bound by the legal conclusion made by the District Court, but should make its own determination on the undisputed facts that Mastro was the employee of Stockton Bulk, not Jones. The inadequacy of the findings should not deter the appellate court from making this determination, in view of the complete record and uncontradicted evidence.

(b) Even if properly labeled, the finding that Mastro was the employee of Jones is clearly erroneous

and not supported by substantial evidence. The overwhelming weight of the evidence at the trial was that all of the factors from which the employment relationship should be determined indicated that Stockton Bulk, rather than Jones, should have been held to be Mastro's employer. Stockton Bulk, not Jones, had exercised the right of supervision and control of Mastro's work, furnished the money to pay him his wages, and received the benefit of his efforts. The contractual arrangement between Jones and Stockton Bulk confirmed that Mastro was the employee of Stockton Bulk.

3. Mastro's Negligence Was Stockton Bulk's Breach

Even if it is accepted that Mastro was Jones' employee, Stockton Bulk agreed to assume the supervision and control of the men hired from the union hall, and Stockton Bulk, rather than Jones, should be held responsible for Mastro's negligence, as a breach of its warranty.

4. The Court Erred in Awarding Pre-Judgment Interest

It was error and an abuse of the trial court's discretion to award pre-judgment interest, since the delay was admittedly and intentionally caused by the shipowner.

ARGUMENT

1. JONES OWED NO WARRANTY

The District Court erred in holding that Jones Stevedoring Company was required to indemnify Nippo Kisen Company, Ltd. Implicit in this holding,

found in conclusions of law one and three (R. 139), is the necessary holding that Jones Stevedoring Company in fact owed a warranty of workmanlike service to the shipowner. It is here contended that Jones owed no such warranty. The only warranty owed was that of Stockton Bulk. In order to determine which of these two companies, Stockton Bulk or Jones, should indemnify the shipowner, it is first necessary to determine the basis for the shipowner's right of indemnity.

(a) The Basis for Indemnity

The current law of indemnity in admiralty cases stems from *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.,* 350 U.S. 124, 76 S.Ct. 232, 100 L.ed. 133 (1956). From that case, it is clear that the right of indemnity is a contractual right, although later cases show that actual privity of contract is not required. *Crumady v. The "JOACHIM HENDRIK FISSER",* 358 U.S. 423, 79 S.Ct. 445, 3 L.ed.2d 413 (1959), and cases following. It is, however, contractual in that it arises from a consensual relationship, whether the contractor agrees directly with the shipowner or through an intermediary. It is this relationship that gives rise to the duty. *Ryan, supra.*

From the cases cited below, it is seen that there are two reasons for the implied warranty of workmanlike service. First, the company selected to perform the loading or discharging operations is chosen because of its expertise in the field, and the shipowner relies on the qualifications of this contracting company in the selection of equipment and method and in the su-

pervision and control of the work. Since the contractor holds itself out to be an expert in cargo-handling, and since it is in control of the operation, the courts have read into the relationship an obligation to perform the work safely and in a workmanlike manner.

In addition, the courts assign a policy reason. The contractor, it is held, is in a better position than the shipowner to prevent accidents occurring as the result of defects in its own equipment or human failures on the part of the men doing the work. Since the shipowner is held liable to the injured workman in the strict liability of unseaworthiness, it is only fair, the courts say, to allow the shipowner to look to the contractor for indemnity in those circumstances where the contractor was in fact in a better position to minimize the risks involved.

Upon this basis, indemnity in this case should fall upon Stockton Bulk, not Jones. The evidence clearly showed that Stockton Bulk was the expert in the field of loading ships with bulk ore, that it held itself out as such an expert, and that the shipowners relied on its expertise. Further, Stockton Bulk had the entire supervision and control of the facilities, equipment, method, and details of all of the work involved in loading the ship. Stockton Bulk, therefore, was in the best position to minimize the risks of injury.

In discussing the nature of the warranty arising from the contractual relationship, the court in *Ryan, supra,* stated that the agreement to load or discharge cargo

> ". . . necessarily includes (the contractor's) . . . obligation not only to stow the (cargo) . . . but to stow (it) . . . properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of (the contractor's) . . . stevedoring contract. It is (the contractor's) . . . warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of (the contractor's) . . . stevedoring service." 350 U.S. at 133-134, 100 L.ed. at 142.

The reason for the rule of indemnity was even further elucidated in *Drago v. A/S Inger,* 194 F. Supp. 398 (E.D.N.Y. 1961). There, the shipowner sought to recover indemnity from the charterer as well as from the discharging stevedore. The charter required the charterer to discharge the cargo, but a consignee of certain cargo had engaged an independent stevedoring company to do so. The shipowner joined the time-charterer, seeking indemnity from it as well as from the stevedoring company, arguing that since the charter party obligated the charterer to discharge the vessel, that there was implied in the charter a promise that the unloading would be done safely, and that a breach of this warranty entitled the ship to indemnity as against the charterer. As to the charterer's liability, the district court stated:

> "The stevedore's warranty arises because it holds itself out to do a job; that it is proficient in its work which, being done aboard a ship, is necessarily fraught with danger and therefore requires a degree of expertise. The charterer, on the other hand, makes no representation that it is either an expert seaman or an expert stevedore. Workmanlike service and reasonable safety on the part of the charterer are not the 'essence' of the charter as they are of the stevedoring contract." 194 F.Supp. at 410.

The stevedore was held liable, and the charterer was discharged. This issue was not before the court on appeal. 305 F.2d 139 (2d Cir. 1962).

This reasoning is underscored by the case of *Matson Navigation Co. v. United States,* 173 F.Supp. 562 (N.D. Cal. 1959). The United States

> "did not offer its services to Matson as a professional stevedore. It merely contracted to assume the responsibility for the removal of its own cargo from Matson's vessel. This is too flimsy a predicate for a warranty of professional competence from which could be implied a contractual obligation to indemnify Matson for any damages it might be required to pay another as the result of improper handling by the United States of its cargo." 173 F.Supp. at 564.

A different result was obtained in *Rogers v. United States Lines,* 303 F.2d 295 (3d Cir. 1962), on facts sufficiently different to warrant the different result, and this further illustrates the basis for indemnity. There, the vessel's only contract was with

the consignee of the cargo, which company agreed to arrange for the discharge of its cargo to its subsidiary, a stevedore company. The vessel owner obtained indemnity from the consignee, because it entered into a contractual undertaking to perform with reasonable safety when it agreed to accept the responsibility for the unloading of its cargo. The *Matson* case was not cited, and there is no discussion as to expertise. There was evidence that the consignee actually directed the manner and method of the discharge, notified the shipowner where it wanted the vessel, arranged for berth, and for railroad cars to receive the cargo. There was an on-going informal practice in so doing.

The corollary of this reason for the indemnity right is that discussed in *Italia Societa v. Oregon Stevedoring Co.,* 376 U.S. 315, 84 S.Ct. 748, 11 L.ed. 2d 732 (1964), and *DeGioia v. United States Lines,* 304 F.2d 421 (2d Cir. 1962). This reason is that the contractor is in a better position to minimize the risks of injury to the men working cargo, since it has supervision and control of the men, equipment, and methods of operation.

In *Italia Societa,* the contractor was a specialist in stevedoring, and was obligated under its contract with the ship to discharge the vessel, supply the necessary equipment, and supervise the operation. The court had this to say:

> "Although none of these factors affect the shipowner's primary liability to the injured employee of Oregon, since its duty to supply a seaworthy vessel is strict and nondelegable, and ex-

> tends to those who perform the unloading and loading portion of the ship's work (citing cases) . . . they demonstrate that Oregon was in a far better position than the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedore contractor in the selection and use of equipment and relies on the competency of the stevedore company." (Citing cases.) 376 U.S. at 322-323, 11 L.ed.2d at 740.

In *Italia Societa,* the cause of the accident was a latent defect in the equipment brought aboard the vessel by the contractor. However, it is obvious that the same considerations apply where the cause of the accident, as in the present case, is negligence of one of the men employed in the discharging operations. In the case of the contractor's equipment, the contractor "which brings its gear aboard knows the history of its prior use and is in a position to establish retirement schedules and periodic retests so as to discover defects and thereby insure safety of operations." 376 U.S. at 323, 11 L.ed. 2d at 740. Where the worker is at fault, the contractor is in a position to instruct and supervise, although the shipowner is not.

Similarly, in *DeGioia, supra,* the basis of the indemnity right was discussed.

> "The primary source of the shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship, by virtue of which he may be held vicariously liable for injuries caused by hazards which the longshoremen either created or had the primary responsibility or opportunity to eliminate or avoid.

> (citation). The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved." 304 F.2d at 425-426.

Similar considerations were involved in *Booth SS Co. v. Meier & Oelhaf Co.,* 262 F.2d 310 (2d Cir. 1958). There, the contractor involved was a company providing engine repair work, and the question was whether the oral agreement between the contractor and the shipowner gave rise to an implied warranty of workmanlike service. The court held that it did, citing both grounds mentioned above, that the shipowner relies on the expertise, supervision, and control of the contractor, and the contractor is in a better position to minimize the risks.

This court recently had occasion to examine the nature of and reason for the implied warranty of workmanlike service. *H & H Ship Service Co. v. Weyerhaeuser Line,* 382 F.2d 711 (9th Cir. 1967). There, the contractor, a ship repair company, argued that the warranty of workmanlike service did not arise under the circumstances. The court stated:

> "Contrary to what appellant tells us, the circumstances of this case relating to control, supervision and expertise do not suggest that a warranty of workmanlike service did not arise. . . . If 'liability should fall upon the party best situated to adopt preventive measures and thereby

> reduce the likelihood of injury,' Italia Societa, etc. v. Oregon Stevedoring Co., supra, 376 U.S. at 324, 84 S.Ct. at 754, the circumstances of this case require that the warranty of workmanlike service be recognized here." (382 F.2d at 713.

Similarly, in *Matson Terminals, Inc. v. Caldwell,* 354 F.2d 681 (9th Cir. 1965), this court had another occasion to examine the basis for indemnity. Quoting at length from the Supreme Court's opinion in *Italia Societa, supra,* the court noted that expertise of a contractor was the basis for the implied warranty.

(b) The Evidence in the Case

Since the shipowner's admitted right to indemnity is based upon the contractual relationship between it and the shiploading contractor, it is necessary to examine in some detail the contractual arrangements in this case, in order to determine which of the two third-party defendants is in fact the shiploading contractor who warranted that the work aboard the vessel would be done in a workmanlike manner.

The basic agreement to load the vessel was made by Stockton Bulk. That company undertook to load the vessel, which undertaking included its use of its own facilities, its supervision and control of the operation, with the use of workers obtained by it from the union hall, with Jones providing payroll services and nominal contact with the Pacific Maritime Association.

A. W. Gatov, president of Stockton Bulk, testified as follows in his deposition, which was admitted into evidence (Tr. 246):

> "(T)he only function of the Stockton Bulk Terminal Company was to unload rail cars of bulk mineral materials to stockpile them and to subsequently *load that material to ships.*" (Gatov deposition, page 6, lines 22 to 24; emphasis supplied.)
>
> *"We were the contractors for loading this material for the account of the Port of Stockton."* (Gatov deposition, page 16, lines 7 to 8; emphasis supplied.)

The Port of Stockton solicited business for the port, and Stockton Bulk "negotiated with the port of Stockton to load this material at a fixed rate per long ton." (Gatov deposition, page 16, line 25 to page 17, line 1.)

R. W. Danska, Jones' office manager, testified at the trial to the oral arrangement between Stockton Bulk and Jones which he negotiated on behalf of Jones. No written contract resulted from these negotiations; the parties operated under an oral agreement. (Tr. 214.) Stockton Bulk, having obtained the contract to load bulk ore on vessels in the Port of Stockton, solicited Jones' services for handling the payroll. (Tr. 215.) The understanding between Jones and Stockton Bulk was that Jones was to have nothing to do with the operations at the ore dock, but that Stockton Bulk was to provide all supervision and control of the men ordered from the hall, and to manage the operation in all ways. Jones was merely to handle the payroll processing only. (Tr. 215, 216, 227-229.)

This agreement was carried out in practice as contemplated. Stockton Bulk was the lessee and operator of the specialized loading facilities used in loading ships with bulk ore, including the conveyors, the tower, the loading spout, the pier, etc. (Tr. 236-237.) Stockton bulk owned the very block in which Mastro's hand was injured, and the wire pendant which held the block. (Tr. 241.)

All supervision and control of the entire operation was carried out by Stockton Bulk. (Tr. 216.) On-the-job supervision was carried out by Leo Goodwin, manager of Stockton Bulk, and Charles F. Cook, Stockton Bulk's superintendent. (Tr. 235, 241.) Goodwin's duties consisted of "Running the plant and its general supervision, maintenance, upkeep." (Tr. 236.) Goodwin was in charge of the ore dock, and if any orders were to be given, they were given by him or his assistant, Cook. (Tr. 96.) If anything was found to be wrong with the gear or equipment, the longshoremen would call it to the attention of the walking boss, and the walking boss would either see the vessel's mate or the permanent supervisory employees of Stockton Bulk: Goodwin or Cook. (Deposition of Charles Cook, page 21, lines 1 to 6; in evidence, Tr. 234-235.)

The manager or the superintendent would be on the dock to assist in spotting the ship when it first arrived, in cooperation with the vessel's mate. Thereafter, the superintendent would delegate authority to the walking boss to move the loading operations from hatch to hatch as necessary, and in general as to how

the work of loading the ship would be done. (Tr. 243-244; Cook deposition, page 37, line 4 to page 38, line 4.)

Thus, the chain of command on the job would begin at the executive level of Stockton Bulk, then to Goodwin and Cook, and then to the walking boss, who conveyed the orders directly to the longshoremen on the ship and on the dock. (Tr. 96-97; 119-120.)

The longshoremen, including the gang bosses and walking bosses, were obtained from the union dispatching halls of the International Longshoremen's and Warehousemen's Union. When a vessel was due to arrive for taking on a cargo of bulk ore, Stockton Bulk would call the union halls and order the necessary men. (Tr. 95-96; 217; 242-243.) Longshoremen, including gang bosses, were taken as dispatched. However, Stockton Bulk utilized the customary system in Stockton of hiring the walking bosses on a preferred basis. (Tr. 225-227.) On the day of the accident, Mastro was dispatched as a gang boss. (Tr. 22.)

Cook or Goodwin were the persons concerned with reporting any accidents occurring in connection with Stockton Bulk's loading operations. In fact, Goodwin, manager of Stockton Bulk, made up the accident report for Mastro's injury. (Tr. 238-240.) Cook also went aboard the HOKYO MARU in his capacity of superintendent, to investigate the accident. (Cook deposition, page 11.)

On the other hand, Jones had nothing to do with the ship-loading operations at the ore dock. (Tr. 216.)

No Jones superintendents or other permanently employed supervisory personnel were ever down on the ore dock participating or supervising the loading operation. (Tr. 122; 220-222; 224-226.) No contact was made with Jones with regard to any particular vessel that came in for loading, other than the payroll documents that were sent to Jones. The gang lists (reports of time worked) were made out by the walking boss or gang boss aboard the ship, and turned into the office of Stockton Bulk. Stockton Bulk then transmitted this payroll data to Jones for processing. (Tr. 227, 233-234.) The only thing that Jones did was to receive the payrolls, process them through PMA for payment to the longshoremen, and bill Stockton Bulk for the amount expended, plus its service charge. (Tr. 215-216; 218; 223-224; 227-228; 234.)

The arrangement between Jones and Stockton Bulk, whereby Jones was to process the payroll, was simply a convenience to Stockton Bulk, who was not a member of PMA. (Tr. 244.)

(c) The Law As Applied to the Evidence in This Case

Thus, in view of the authorities cited above, Stockton Bulk, not Jones, should be held liable in indemnity to the shipowner. Stockton Bulk, not Jones, was the expert in the specialized field of loading ships with bulk ore. It, not Jones, was holding itself out to Stockton Port District and shipowners that it was qualified as such an expert. Stockton Bulk, not Jones, obtained the basic contract to do the loading of the ships that Stockton Port District

solicited, relying upon the expertise of Stockton Bulk. Stockton Bulk and not Jones had this direct contract with Stockton Port District, and had direct contact with the vessels that it loaded. Stockton Bulk and not Jones was notified of incoming vessels, the amounts and types of cargoes to be loaded, and the relevant times and dates involved. Stockton Bulk and not Jones ordered the men from the union hall, and had complete supervision and control over these men, the methods used, and all of the gear and equipment used in the loading process. Stockton Bulk and not Jones owned or leased, maintained, supplied, and furnished all gear and equipment necessary for the loading operation which was not provided by the ships.

It was Stockton Bulk's undertaking that falls within the purview of *Ryan* and the cases following it. That is the agreement that "necessarily includes (the) . . . obligation not only to stow the (cargo) . . . but to stow (it) . . . properly and safely". *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp., supra,* 350 U.S. at 133, 100 L.ed. at 142. Stockton Bulk's is the expertise referred to in *Drago, supra,* as well as the holding out referred to in that case. Compare Stockton Bulk's situation to that of the United States in *Matson Navigation Co. v. United States, supra,* where the government escaped indemnity liability because it was not in the business of handling cargo. Here, Stockton Bulk's *only* business was loading ships.

Similarly, Stockton Bulk, not Jones, is in the position contemplated in *Italia Societa, supra,* and *De-*

Gioia, supra. Stockton Bulk, not Jones, having full supervision and control as shown above, was in the position of being best able to prevent accidents in the loading operations. Stockton Bulk, not Jones, was, in the words of Judge Clark, that segment of the enterprise "most able to minimize the particular risk involved." *DeGioia v. United States Lines, supra,* 304 F.2d at 426.

As a practical matter, it was Stockton Bulk's men, methods, and machinery that got the job done. That company was in a position to discover defects in its equipment by subjecting it to appropriate tests. That company was familiar with the history of its own equipment and its prior use, and was "in a position to establish retirement schedules and periodic retests so as to discover the defects and thereby insure safety of operations." *Italia Societa v. Oregon Stevedoring Co., supra,* 376 U.S. at 323, 11 L.ed. 2d at 740. Similarly, if any improper method was involved in the loading operations, the remedy lay in the hands of Stockton Bulk.

On the other hand, there is no evidence that Jones undertook to do any stevedoring aboard the vessel. There is no proof that Jones undertook to do or did anything other than paperwork in connection with the processing of payrolls for the convenience of Stockton Bulk, and for payment of a small fee per check written. Although Jones was in the stevedoring business generally in Stockton as well as elsewhere (Tr. 222), it did not act as a stevedore in this situation. It held itself out to no one as an expert in con-

nection with the loading of ships with bulk ore. It had no special claim to expertise, no special facilities or equipment, no exclusive contract to load ships with bulk ore, as Stockton Bulk did. Jones had no control over the men, no control over the methods employed or the equipment used in loading bulk ore. Jones was in no position to take any steps whatsoever to prevent an accident occurring during the loading process. Jones meets none of the requirements for imposition of the warranty of workmanlike service as laid down by the foregoing authorities.

Therefore it was error to require Jones to indemnify the vessel in this case.

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2. MASTRO WAS NOT JONES' EMPLOYEE

(a) A Conclusion of Law and Not a Finding of Fact

Finding of fact number one is as follows: "Plaintiff, Joseph F. Mastro, was at all material times employed as a longshoreman by Jones Stevedoring Co., and not by Stockton Bulk Terminal Company of California, Inc." (R. 139.)

Actually, this kind of determination is a conclusion of law, rather than a finding of fact. Employment of one person by another is a legal relationship, based upon a number of underlying factors. The most important of these factors is the right of the employer to direct and control the details of the work performed by the employee. Thus, the California courts have held that the right to control and direct the activities of the worker, and the manner and method

of work gives rise to the employment relationship. *Miller v. Long Beach Oil Dev. Co.,* 167 Cal.App.2d 546, 334 P.2d 695 (1959); *Eye v. Kafer, Inc.,* 202 Cal. App.2d 449, 20 Cal.Rptr. 841 (1962).

The fact that one is performing work or labor for another is prima facie evidence of the relationship of employment, and such person is presumed to be a servant of the one to whom he is rendering service. *Robinson v. George,* 16 Cal.2d 238, 242, 105 P.2d 914 (1940).

The form of a contract of employment is not controlling, but the courts look rather to the substance of the relationship. *Nichols v. Arthur Murray, Inc.,* 248 Cal.App.2d 610, 56 Cal.Rptr. 728 (1967); *Empire Star Mines Co. v. California Employment Commission,* 28 Cal.2d 33, 168 P.2d 686 (1946).

In *Taft Broadcasting Co. v. Columbus-Dayton Local,* 297 F.2d 149 (6th Cir. 1961), the court was faced with a question very similar to the kind of determination that should have been made in this case. There, a man worked for a radio station as an announcer, and also did a news program on a television station owned by a corporation which was a subsidiary of the corporation which owned the radio station. The union had a collective bargaining agreement with the television station, but not with the radio station. The television station urged that the man was an employee of the radio station and not of the television station, and that therefore the arbitration provisions of the union contract did not apply to the man's discharge from his television duties. Upon stipulated

facts, the trial court found that the union member was not an employee of the television station, and concluded that the dispute was not arbitrable.

On appeal, the court stated that the finding of fact was in reality a conclusion of law, and that therefore the appellate court was free to draw its own legal conclusions and inferences. The court then proceeded to hold that the man was an employee of the television station, even if only a "loaned employee," because he was subject to the direction and control of the television station.

In *Taft,* the trial court concerned itself merely with the form of the relationship, ignoring the substance. The court apparently ignored the fact that the man was performing work for the television station under its direction and control, seizing only upon the formal relationship reflected in the written contracts. Similarly, the trial court in this case seized upon the pro forma relationship and ignored the fact that Mastro was performing work for Stockton Bulk in its business of loading ships, and was working under its supervision and control. It is submitted that this court should follow the appellate decision in *Taft,* and reverse the judgment below.

Although requested to do so, the trial judge refused to make findings of fact on the evidence as to these factors underlying the conclusion that Jones employed Mastro. See Jones' Objections to Findings of Fact and Conclusions of Law and Proposed Modifications and Additions. (R. 132-137.) If such findings had been made, the conclusion would have been inescapable that

Mastro was in fact the employee of Stockton Bulk, rather than of Jones.

If this determination should have been designated a conclusion of law, this court is not bound by the trial court's determination and may determine the matter for itself. *Brown v. Cowden Livestock Co.,* 187 F.2d 1015 (9th Cir. 1951).

The trial court's label as to findings of fact or conclusions of law does not bind the appellate court, which can draw its own legal conclusions and inferences. *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.,* 298 F.2d 356 (6th Cir. 1961).

It is submitted that the determination of employment was a conclusion of law, and this court is therefore free to draw its own conclusions from the evidence in the case, which is mostly uncontradicted. *Taft Broadcasting Co. v. Columbus-Dayton Local, supra,* 297 F.2d 149 (6th Cir. 1961).

Even if this determination be considered a mixed question of law and fact, it is reviewable on appeal as a conclusion of law, not as a finding of fact. Again, this court would not then be bound by the determination made below, or by the "clearly erroneous" rule. *Official Creditors' Committee v. Ely,* 337 F.2d 461 (9th Cir. 1964).

The reason for the clearly erroneous rule is that generally the trial court is in a better position to evaluate the credibility of witnesses, where the testimony is contradictory, or where facts are difficult to ascertain. Since the trial court here was making its

determination of a legal relationship from uncontradicted facts, without the necessity of evaluating credibility, the reason for the safeguard of the clearly erroneous rule is absent. *United States v. E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 77 S.Ct. 872, 1 L.ed. 2d 1057 (1957). Therefore, it is submitted that whether the determination of Mastro's employment was a conclusion of law or a mixed question of law and fact, this court is in as good a position to make its determination as was the trial court, and this court should therefore determine the question for itself. *Brown v. Cowden Livestock Co., supra.*

Finally, the mere conclusionary finding accepted by the court as proposed by shipowner's counsel, is clearly insufficient to show what was the trial court's concept of the determinative facts and legal standard. The conclusions of law are no more enlightening. Accordingly, there was no sufficient compliance with Rule 52. *Commissioner v. Duberstein,* 363 U.S. 278, 80 S.Ct. 1190, 4 L.ed.2d 1218 (1960). However, the Court of Appeals need not remand for additional findings, but may make its determination on the record on appeal, where, as here, the record is complete and the evidence is clear and uncontradicted. *Yanish v. Barber,* 232 F.2d 939 (9th Cir. 1956). The court should therefore hold that Mastro was the employee of Stockton Bulk, not Jones, for purposes of indemnity.

(b) Finding of Fact Number One Is Clearly Erroneous

Under Rule 52 (a), findings of fact shall not be set aside unless they are clearly erroneous. Even if find-

ing number one, quoted above, should be considered a finding of fact, it is clearly erroneous and should be set aside.

A finding is clearly erroneous, "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.ed. 746, 766 (1948).

Thus, "some evidence" is not necessarily "substantial evidence." Substantial evidence is more than merely some evidence, and more than a mere scintilla of evidence. The court should look to all the evidence in the case, and view the evidence urged in support of the findings in the light of all of the rest of the evidence. *United States v. Kaplan,* 277 F.2d 405 (5th Cir. 1960).

As indicated in the previous section of this brief, the employment relationship is based upon a number of factors, including control of the activities of the employee. It is obvious from a review of the evidence that Stockton Bulk and not Jones had that control. In addition, if the form of the relationship is disregarded, and only its substance considered, it is clear that Mastro was the employee of Stockton Bulk.

Since the trial court made no findings of facts underlying the ultimate fact of employment, as requested by Jones below, it is uncertain what the rationale for this determination is. Admittedly, Mastro testified on direct examination:

"Q. Who was your employer, as far as you know, January 9, 1962 (the day of the accident)?
A. Jones Stevedoring Company.
Q. Why do you say that?
A. I got my pay from Jones Stevedoring Company." (Tr. 21-22.)

However, on cross-examination, he acknowledged that the only reason he said that was because Jones was handling the payroll. (Tr. 93.) He felt that any arrangement between Jones and Stockton Bulk was actually none of his business. (Tr. 95.)

Also in evidence as an exhibit is the report of accident, which bore Jones' name. (Defendant's Exhibit D.) This, of course, was in accordance with the arrangement between Jones and Stockton Bulk. It should be noted that Goodwin, Stockton Bulk's manager, made out the accident report and signed it. (Tr. 240.)

In connection with Mastro's testimony, the trial judge was made aware at the time the testimony was taken that there was a substantial and serious question as to who Mastro's employer was and as to who owed any warranty of workmanlike service to the ship. It was immediately apparent that Mastro's testimony referred merely to the form that the employment relationship had taken, under the contractual arrangement between Stockton Bulk and Jones. It is submitted that this testimony is insignificant in light of all the other evidence as to the contractual arrangement and its practical operation. The important consideration in this connection is the substance of the

matter, and not the form. The fact that one of the parties is designated a stevedoring company and one a terminal, is a matter of form and not of substance. Similarly, the fact that Jones' identifying number appeared on Mastro's paycheck, pursuant to the arrangement between Jones and Stockton Bulk is a mere matter of form and not of substance. A decision based upon the mere form of a relationship, disregarding the substance, is not based upon substantial evidence.

The significant evidence as to employment is that relating to the right to direction and control of the employee's activities. (See the preceding section of this brief.) It is clear from the uncontradicted evidence in the case that Stockton Bulk and not Jones had the right to direct and control Mastro's work. Further, although Jones made the arrangements for payment of Mastro's wages, and its identifying number appeared on his checks, the money came from Stockton Bulk. Again, viewing the substance rather than the form of the relationship, it is clear that Mastro was Bulk's employee.

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3. MASTRO'S NEGLIGENCE WAS STOCKTON BULK'S BREACH

It is argued above that Jones made no warranty to the shipowner, and further that Mastro was not Jones' employee. If these arguments are accepted, then it naturally follows that Mastro's negligence could not be a breach of any warranty on the part of Jones. How-

ever, even if the trial court's determination that Mastro was an employee of Jones is accepted, still conclusion of law number one (R. 139), that Mastro's negligence constituted a breach of a warranty owed to the shipowner by Jones, would be incorrect.

Thus, even with this assumption, the nature and basis of the shipowner's right of indemnity still must be considered. As indicated in the first section of this brief, the right of indemnity arises because of expertise, supervision and control, and accident-prevention considerations. As previously indicated, Stockton Bulk rather than Jones was in the position contemplated by these criteria. Therefore, even though Mastro be considered technically Jones' employee, still the warranty was that of Stockton Bulk, not Jones. Since Stockton Bulk agreed to assume the supervision and control of the men hired from the union hall, it should be held responsible for Mastro's negligence, as a breach of its warranty.

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4. THE COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST

Conclusion of law number three awards interest on the damages from the time shipowner paid its attorneys. (R. 139.) This pre-judgment interest should not have been allowed, because the delay of approximately two and one-half years in bringing the indemnity aspects of the case to trial and judgment, was caused by the shipowner's counsel. He admitted to

the trial court that he *intentionally* delayed bringing the matter on for further trial, while waiting for a favorable result in the appeal of another case which bore upon the issues herein. Counsel's remarks are set forth at length in the record. (Tr. 173-174.) For this reason, the award of pre-judgment interest was in error and was an abuse of the trial court's discretion. *The "STJERNEBORG",* 106 F.2d 896 (9th Cir. 1939), affirmed on other grounds *sub nom. Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.,* 310 U.S. 268, 60 S.Ct. 937, 84 L.ed. 1197 (1940); *The "SALUTATION",* 37 F.2d 337 (2d Cir. 1930).

In *The "SALUTATION", supra,* the court held that it was an abuse of discretion to allow interest in the face of an unexplained delay. The court stated: "Such delays are sufficient reason for forfeiting interest." 37 F.2d at 338. In the instant case, the appellee admittedly caused the delay intentionally, for its own purposes. A fortiori, the shipowner here should be held to have intentionally forfeited any right to pre-judgment interest.

The first portion of the trial was heard on March 22, 23, and 24, 1965. See docket sheet. (R. 155.) The indemnity case was not brought to trial until May 8, 1967, more than two years later. See docket sheet. (R. 156.) The final judgment was not entered until October 30, 1967. (R. 156.)

Accordingly, it is respectfully submitted that it was error and an abuse of the trial court's discretion to award pre-judgment interest. Even if the case is af-

firmed on its merits, the award of interest should be set aside.

CONCLUSION

From the authorities referred to above, the basis for the shipowner's right of indemnity can be seen to arise from the holding out of the contractor as expert in his field, and from his favorable position with regard to minimizing the risks of accidents arising out of the enterprise. Stockton Bulk fits both of these descriptions, and Jones fits neither. Stockton Bulk had the basic contract for the loading of the vessel, and the supervision and control of all of the work. Jones merely provided payroll services under a subsidiary agreement with Stockton Bulk.

Further, the determination of Mastro's employment was erroneous, either as a finding of fact or a conclusion of law. Under any view of the matter, Mastro was Stockton Bulk's employee, and his negligence is a breach of their warranty.

Even if Mastro is assumed to be Jones' employee, still the only warranty in the case that was or could have been breached was that of Stockton Bulk.

Accordingly, it is respectfully submitted that there is no liability of Jones Stevedoring for indemnity to Nippo Kisen Co., Ltd., but that Stockton Bulk Terminal Company of California, Inc., should be held liable to indemnify the shipowner.

If the judgment is affirmed on its merits, the remaining issue of pre-judgment interest should be

resolved in favor of Jones, since the delay was admittedly the responsibility of the shipowner. Therefore, interest during that period of delay should not be allowed.

Dated, San Francisco, California,
June 24, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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(Appendix Follows)

Appendix

Appendix

TABLE OF EXHIBITS